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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 237

SUN SHIPBUILDING COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED DECEMBER 30, 1924

(30,781)

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INDEX

	Original	Print
Record from Court of Claims	1	1
Petition	1	1
Exhibit "A"—Contract	13	7
General traverse	33	18
Argument and submission	33	18
Findings of fact	34	19
Conclusion of law	38	23
Opinion, Downey, J.	39	24
Judgment	42	27
Proceedings after judgment	42	27
Petition for appeal	43	27
Order allowing appeal	43	28
Clerk's certificate	44	28

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[fol. 1] IN COURT OF CLAIMS OF THE UNITED STATES

No. B317

SUN SHIPBUILDING COMPANY, Plaintiff,

vs.

THE UNITED STATES

I. PETITION—Filed October 30, 1922

To the Honorable Chief Justice and Associate Judges of the Court of Claims:

The plaintiff, above named, for its petition herein respectfully shows to the Court:

For a First Cause of Action

I

The Sun Shipbuilding Company, at the times hereinafter mentioned, was and is a corporation organized and existing under the laws of the State of Pennsylvania, and was and is the owner of a shipbuilding plant in the City of Chester, Pennsylvania.

II

Prior to June 11, 1917, the plaintiff, in addition to other work [fol. 2] under contract, had contracts with various persons for the construction of eighteen sea-going vessels of approximately 10,000 dead weight tons, including four of such steamers for the United States Shipping Board, and said contracts for the eighteen steamers mentioned and its other contracts constituted sufficient work to occupy all of plaintiff's docks and ways and other shipbuilding facilities to their full capacity.

III

By the "Naval Emergency Fund" provision of the "Act making appropriations for the Naval Service for the fiscal year ending June 30, 1918" approved March 4, 1917, it was provided in part as follows:

"To enable the President to secure the more economic and expeditious delivery of materials, equipment and munitions and secure the more expeditious construction of ships, authorized and for the purchase or construction of such additional torpedo boat destroyers, submarine chasers, and such other naval small craft, including aircraft, guns and ammunitions for all of said vessels and aircraft and

for each and every purpose connected therewith, as the President may direct, to be expended at the direction and in the discretion of the President, $115,000,000, or so much thereof as may be necessary and to be immediately available.

* * * * * * *

"That in time of war, or national emergency arising prior to March first, nineteen hundred and eighteen, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:

"First. Within the limits of the amounts appropriated therefor, [fol. 3] to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any such person to whom such order is given and such order shall take precedure over all other orders and contracts theretofore placed with such person. If any person owning, leasing or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish or manufacture the kind, quantity or quality of ships or war material so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any factory of such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

* * * * * * *

"Fourth. To requisition and take over for use or operation by the Government any factory, or any part thereof, without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory.

* * * * * * *

"(d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material in accordance with the provisions of paragraph (b), it shall make just com- [fol. 4] pensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum as shall make up such amount as

will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

IV

On or about May 16, 1917, the Secretary of the Navy requested of plaintiff information as to availability of facilities for the construction of certain Fleet Mine Sweepers or Tenders, designated by the Navy Department as seagoing mine sweepers. The plaintiff sought to be relieved from constructing said small craft and forwarded by telegraph the following communication to the Navy Department:

"June 11, 1917.

"Admiral D. W. Taylor, Navy Department, Washington, D. C.:

"Investigation discloses that building mine sweepers will greatly hamper our yard and curtail output vastly as no other large yards is building these sweepers and as many small yards are well equipped and anxious to do this we protest vigorously against being so compelled. Our plant solely constructed for building ten thousand ton vessels which we have eighteen contracted for including four for [fol. 5] Shipping Board. If we have no other alternative kindly forward contract for our signature. We shall probably buy or build plant for this purpose.

Sun Shipbuilding Company."

On or about June 12, 1917, the Secretary of the Navy, on behalf of the President, placed with the plaintiff a requisition order in writing which provided in parts as follows:

"Referring to your telegram of June 11, 1917, in reference to the construction of seagoing mine sweepers, the President hereby places with you, as an order under the provisions of the Naval Appropriation Act of March 4, 1917, the requirement that you comply with the terms of a contract, to be signed hereafter, to construct seagoing mine Sweepers Nos. 22, 23 and 24."

By a certain order or contract in writing, which was within the limits of the said appropriation available, and dated June 13, 1917, detailed provision was made for the construction by the plaintiff of the said three seagoing mine sweepers, said instrument containing the words that "the President hereby places with the Sun Shipbuilding Company as an order under the provisions of said Act of March 4, 1917, the requirement that it comply with the contract, hereinafter set forth, to construct three of said vessels, complete in all respects" * * *.

Said order or contract of June 13, 1917, in part further provided:

"Whereas, the department has contracted with the Harlan & Hollinsworth Corporation, of Wilmington, Del., for their services [fol. 6] without expense to the contractor to—

"(a) Prepare all detail working plans, obtain the approval thereof by the American Bureau of Shipping and by the department, as may be necessary, and furnish to the contractor such blue prints thereof as he may require; (b) prepare all schedules of materials; (c) place all orders for all materials for delivery to the contractor, except such minor items of material, and such indirect material as is customary to have in stock and is not usually ordered specifically for the vessel; (d) make all patterns; all as may be necessary for the construction of the said vessels complete in all respects, in accordance with the drawings, plans, and specifications aforesaid.

* * * * * * *

"Fourth. The material to be used in the construction of these vessels will be ordered by the Harlan & Hollingsworth Corporation, subject to the approval of the department, as aforesaid, for delivery direct to the contractor, who will receive the same and make payment direct to the individual, firm, or corporation with whom the order has been placed, at the price stipulated in the order, and in accordance with the terms and payment as may be arranged by the contractor direct with such individual, firm, or corporation; the amounts so paid for material will enter into the actual cost of the vessel and will be repaid to the contractor in the manner hereinafter provided for. The contractor will make such examination and inspection as may be necessary of the material thus purchased immediately upon its delivery, and will immediately invite the attention of the department or its representative to any material which, in its opinion, is inferior in quality or not suitable for the purpose for which in- [fol. 7] tended, but the contractor will not be responsible for the quality or suitability of such material. The contractor will furthermore supply such assistance as may be required to the inspectors of the department and of the American Bureau of Shipping in making any tests and inspection of such material at the shipyard considered necessary by such inspectors."

* * * * * * *

VI

At or about the time said requisition order was placed with the plaintiff, the Secretary of the Navy and his agents acting for the President, directed the plaintiff to keep one of its shipbuilding ways, designated as No. 5, free and clear of all other work in order that the same might be available for the performance of said order dated June 13, 1917; and plaintiff, in compliance with said instructions of the Secretary of the Navy and his agents, kept said way free and clear of all other work, and the way remained idle on account of the failure of the Navy Department to supply material until October 8, 1917, the date of laying the first keel, or 112 days; and the further unreasonable delay of the Navy Department in the supply of material caused the way to remain occupied on the work to May 30, 1918, or a total of 345 days.

VII

Under the conditions existing at the time, a fair and reasonable period for the construction of said three mine sweepers was 118 days. However, notwithstanding plaintiff's repeated request for the de- [fol. 8] livery of said material, and its readiness and willingness immediately to perform, the Secretary of the Navy and his agents so neglected and failed to supply the necessary material for the performance of said work, that plaintiff was unable to lay the keel of the first of said boats until about October 8, 1917, and by reason thereof and subsequent neglect and delays of the defendants and their agents, and through no fault of plaintiff, said Shipbuilding Way No. 5 remained idle and unproductive to the plaintiff for a total period of 228 days. By reason of the premises and the said requisition orders of June 11 and 13, 1917, and the said Act of March 4, 1917, there arose and exists an implied promise on the part of the United States to pay as just compensation to the plaintiff for the period said way was unoccupied and unproductive, the sum of $108,258.96.

VIII

On information and belief, in compliance with the provisions of said Act of March 4, 1917, there was set up by the Secretary of the Navy, a Compensation Board to hear and determine on behalf of the President, claims of the nature of the one herein presented, and prior to the institution of this suit the plaintiff duly presented this claim to the said Compensation Board and said claim was disallowed. The plaintiff accordingly brings this suit in the Court of Claims, not being satisfied with the decision of said Compensation Board in denying plaintiff's claim.

IX

Plaintiff and its officers at all times have borne true allegiance to the Government of the United States and have not in any manner or way aided, abetted or given encouragement to rebellion against the United States.

[fol. 9]

X

No assignment or transfer of this claim has been made and the said amount is due to plaintiff after allowing all just credits and offsets.

For a Second Cause of Action

The plaintiff for a Second cause of action realleges the statements contained in the paragraph above designated as I, II, III, IV, V, VIII and IX, and begs leave to have the same considered as a part hereof, as if herein fully set forth.

XII

A copy of said order or contract dated June 13, 1917, mentioned in paragraph designated "V" above is hereto annexed and made a part hereof as Exhibit "A."

XIII

At all times after plaintiff received said order or contract of June 13, 1917, plaintiff duly substantially performed each and every term and condition thereof, except in so far as due performance was prevented by the defendants and its agents, as set forth in the above stated First cause of action, and plaintiff duly delivered to the defendants the last of the three said mine sweepers constructed in accordance with the defendant's orders and requirements, on the approximate date September 5, 1918.

[fol. 10]

XIV

The said order or contract of June 13, 1917, among other things, provided in paragraphs designated "Sixteenth" and "Seventeenth" thereof, to which reference is made, the manner of determining the compensation which was due plaintiff for the performance of said work described in said order. However, notwithstanding plaintiff's due performance of the terms and conditions thereof, the defendants have failed and refused to reimburse plaintiff for said items of cost as provided therein to be paid and which should be paid as a part of compensation due plaintiff for the work performed and material furnished on said work. Said item of cost and compensation due plaintiff consist of:

1. Salaries paid for said work in the sum of $1,000.76, and 10% thereof amounting to $100.08, aggregating $1,100.84.

2. Item of 10% on certain retroactive wages paid by plaintiff, said 10% amounting to $1,335.70.

3. An item for amortization or depreciation of values of plant and property described in said order or contract, amounting to $95,773.75.

XV

Said order or contract further contained the following provision:

"Ninth. On completion of the dock trials above mentioned, and when the vessel is substantially completed, except minor items of work that may, in the discretion of the Secretary of the Navy, be [fol. 11] left unfinished until after delivery, the vessel shall be delivered and shall thereupon be conditionally accepted, and the department shall take possession of the vessel and shall be responsible for the safety thereof, and payment of all money due under this contract shall be made, subject, however, to a special reserve therefrom of $5,000, as provided for under paragraph 2 of the sixteenth clause of this contract.

* * * * * * *

"If on the expiration of six months from the date of conditional acceptance of the vessel there shall appear no weakness, deficiency, defect, failure, breaking down, or deterioration, due to workmanship in her other than that due to fair wear and tear, then she shall be finally accepted, and the said special reserve less such deductions as may be made under the provisions of this contract shall be paid: provided, however, that the deduction for the breach of guaranties and agreements as to workmanship shall be limited to five thousand dollars ($5,000)."

XVI

On information and belief, within a period of six months after the completion of said seagoing mine sweepers, there did not appear any weakness, deficiency, defect, failure, breakdown or deterioration due to workmanship in them, other than due to fair wear and tear; yet, notwithstanding the premises the defendants have failed and refused to pay to plaintiff a balance due from an amount reserved under said paragraph "Ninth" above in the sum of $1,500.

[fol. 12]

XVII

No assignment or transfer of this claim has been made and the said amounts are due to plaintiff after allowing all just credits and offsets.

Wherefore, for the reasons stated in the First and Second causes of action above set forth, the plaintiff respectfully demands judgment against the defendants for said sums, $108,258.96; $4,400.84; $1,335.70; $95,773.75; and $1,500.00, aggregating in all the sum of $211,269.25.

Sun Shipbuilding Company, by Frank S. Reitzel.

Sworn to by Frank S. Reitzel. Jurat omitted in printing.

[fol. 13]

EXHIBIT A TO PETITION

No. 28848

Contract for the Construction of Seagoing Mine Sweepers Nos. 22, 23, and 24

Contract of two parts made and concluded this 13th day of June, A. D. 1917, by and between the Sun Shipbuilding Company, a corporation of the State of Pennsylvania, represented by J. Howard Pew, president of said corporation, party of the first part (hereinafter called the contractor), and the United States, represented by the Secretary of the Navy, party of the second part (hereinafter called the department).

Whereas the act of Congress making appropriations for the naval service for the fiscal year ending June 30, 1918, approved March

4, 1917, under the title naval emergency fund, authorizes the President to construct or purchase such naval small craft as he may direct in addition to the vessels authorized in said act; and

Whereas the drawings, plans and specifications for seagoing mine sweepers have been duly provided, adopted and approved by the department; and

Whereas the Congress having declared by joint resolution, approved April 6, 1917, that war exists between the United States and Germany, the President hereby places with the Sun Shipbuilding Company, as an order under the provisions of said act of March 4, 1917, the requirement that it comply with the contract, hereinafter set forth, to construct 3 of said vessels, complete in all respects, with [fol. 14] the exceptions stated in the specifications, which vessels are for the purposes of this contract designated and known as seagoing mine sweepers, Nos. 22, 23 and 24.

Whereas the department has contracted with Harlan & Hollingsworth Corporation of Wilmington, Del., for their services without expense to the contractor to:

(a) Prepare all detail working plans, obtain the approval thereof by the American Bureau of Shipping and by the department, as may be necessary, and furnish to the contractor such blueprints thereof as he may require; (b) prepare all schedules of materials; (c) place all orders for all materials for delivery to the contractor, except such minor items of material, and such indirect material as is customary to have in stock and is not usually ordered specifically for the vessel; (d) make all patterns; all as may be necessary for the construction of the said vessels complete in all respects, in accordance with the drawings, plans, and specifications aforesaid.

Now, Therefore, This Contract Witnesseth, That, in consideration of the premises, and for and in consideration of the payments to be made as hereinafter provided, the contractor hereby covenants and agrees to and with the department as follows, that is to say:

First. The contractor will make the necessary outlays in advance and will construct 3 seagoing mine sweepers of approximately 950 tons trial displacement each; said vessels to be new and of American registry and to conform to the plans and specifications provided by the department, as stated above, and to the plans prepared by the Harlan & Hollingsworth Corporation, and approved by competent authority, [fol. 15] as provided for herein and provided with fittings, equipment, Machinery, devices, appliances, and appurtenances of every kind with latest improvements, complete in all respects, and ready for service, and will deliver the vessels to an officer, designated by the department, at the contractor's works.

Second. The vessels shall be inspected during the progress of the work by the surveyors of the American Bureau of Shipping, and the inspection certificate of the highest rating for seagoing vessels of that organization must be obtained and furnished when the vessels are ready for delivery. Tonnage certificate, in duplicate, will also be

obtained from the Commissioner of Navigation and furnished at the time of delivery. One of these certificates will at the same time be furnished the Bureau of Construction and Repair. All expenses of inspection and certificates to be borne by the contractor. The department reserves the right to appoint visiting inspectors to examine the quality of the work, but without any authority to make changes therein.

Third. The construction of said vessel (the word vessels as used throughout this contract being intended to include everything covered by the drawings, plans, and specifications above referred to) shall conform in all respects to and with said drawings, plans, and specifications, including duly authorized changes therein, which are hereto annexed, and shall be deemed and taken as forming a part of this contract with the like operation and effect as if the same were incorporated herein. They contain information of a confidential character that cannot be made public without detriment to the Government's interests, and they are to be treated as confidential by the parties to this contract. No omission in the drawings, plans, and [fol. 16] specifications of any detail, object, or provision necessary to carry this contract into full and complete effect in accordance with the practice established at the time of the signing of this contract, in accordance with the object and intent of the acts of Congress above referred to, shall operate to the disadvantage of the department, but the same shall be satisfactorily supplied, performed, and observed by the contractor, and compensation by reason of, or for, or on account of, such extra performance, shall be made to the contractor on the same basis as for the work performed in general under this contract; and it is hereby further provided, and this contract is upon the express condition, that the provisions of this contract, and the drawings, plans, and specifications aforesaid may be changed by the department, but no such changes shall be made when the cost thereof, shall, in the execution of the work, exceed five hundred dollars ($500) except on the written order of the Secretary of the Navy.

Fourth. The materials to be used in the construction of these vessels will be ordered by the Harlan & Hollingsworth Corporation, subject to the approval of the department, as aforesaid, for delivery direct to the contractor, who will receive the same and make payment direct to the individual, firm, or corporation with whom the order has been placed, at the price stipulated in the order, and in accordance with the terms and payment as may be arranged by the contractor direct with such individual, firm, or corporation; the amounts so paid for material will enter into the actual cost of the vessel and will be repaid to the contractor in the manner hereinafter provided for. The contractor will make such examination and inspection, as may be necessary, of the material thus purchased immediately upon its delivery, and will immediately [fol. 17] the attention of the department or its representative to any material which, in its opinion, is inferior in quality or not suitable

for the purpose for which intended, but the contractor will not be responsible for the quality or suitability of the material. The contractor will furthermore supply such assistance as may be required to the inspectors of the department and of the American Bureau of Shipping in making any test and inspection of such material at the shipyard considered necessary by such inspectors.

Fifth. The workmanship on said vessels, in detail and finish in all parts, shall be first class and of the very best quality usual in American seagoing vessels, and shall, at all times, be subject to the inspection of the American Bureau of Shipping and of the visting inspectors appointed by the department; it being hereby understood, covenanted, and agreed, that the visiting inspectors may, with the approval of the department, peremptorily reject any unfit workmanship if below the standard of the American Bureau of Shipping for vessels of this class. The contractor shall furnish the inspectors with full facilities for the inspection herein provided for.

Sixth. Said vessel and all materials and appliances provided by either the contractor or the department, for and used, or to be used, in the construction thereof shall be kept duly insured against fire and marine risks, settling of stocks, breakage of ways, and risks of launching, which insurance shall be renewed and increased, from time to time, by the contractor, until the delivery of the vessel, the loss, if any, to be stated in the policies as payable to the Secretary of the Navy; the insurance to be effected in such manner and in such companies as shall be approved by him, and in an amount to [fol. 18] be fixed, from time to time, by him, not exceeding the sum of the payments made under this contract.

Seventh. Unless prevented by strikes, the work under this contract shall be prosecuted at all times with the utmost vigor and dispatch, without interruption for any cause within the control of the contractor, and the number and class of men engaged on the contract, and the hours of work, subject to the limitations in the thirteenth clause, shall be subject to the approval and direction of the department. It is understood that the contractor proposes to extend its present plant and to add to its present facilities especically for the purpose of carrying out this contract as may be neccessary, and that it is to be especially compensated therefor hereinafter provided for, but the contractor will not be required to build a dry dock capable of accommodating this vessel.

Eighth. When each vessel is substantially complete, except minor items of work, which may, in the discretion of the department, be left unfinished, the contractor shall make such trials at dock as may be directed by the department, and shall correct defects and deficiene-es as directed by the department or its representative. After delivery, as hereinafter provided for, and prior to the expiration of 6 months and 10 days therefrom, the vessel may be subjected to such trials, at the expense of the department, as maye be prescribed by the Secretary of the Navy.

Ninth. On completion of the dock trials above mentioned, and when the vessel is substantially completed, except minor items of work that may, in the discretion of the Secretary of the Navy, be left unfinished until after delivery, the vessel shall be delivered and shall thereupon be conditionally accepted, and the department shall [fol. 19] take possession of the vessel and shall be responsible for the safety thereof, and payment of all money due under this contract shall be made, subject, however, to a special reserve therefrom of $5,000, as provided for under paragraph 2 of the sixteenth clause of this contract.

In case of conditional acceptance of said vessel, the said special reserve of five thousand dollars ($5,000) shall be held for a period of six months from the date such acceptance takes effect, provided, that during said period the vessel may be tried, after being fully equipped, armed, or weighted correspondingly, and in all respects complete and ready for sea, under conditions prescribed or approved by the Secretary of the Navy, the expenses of such trials to be borne by the department.

If at any times within six months after the conditional acceptance of said vessel any weakness, deficiency, defect, failure, breaking down, or deterioration in the vessel due to workmanship of the contractor other than that due to fair wear and tear, shall appear, the same shall be corrected and repaired to the satisfaction of the Secretary of the Navy, at the expense of the contractor.

If on the expiration of six months from the date of conditional acceptance of the vessel there shall appear no weakness, deficiency, defect, failure, breaking down, or deterioration, due to workmanship in her other than that due to fair wear and tear, then she shall be finally accepted, and the said special reserve less such deductions as may be made under the provisions of this contract shall be paid: Provided, however, that the deduction for the breach of guaranties and agreements as to workmanship shall be limited to five thousand dollars ($5,000).

[fol. 20] The contractor shall be informed of all defects and deficiencies discovered during said period for which it is held responsible, and the decision of the Secretary of the Navy as to the responsibility of the contractor for such defects and deficiencies shall be final and binding on the parties to this contract. The actual cost of making good all defects and deficiencies for which the contractor is held responsible shall be deducted from the payment to be made in final settlement under this contract; Provided, that in order to expedite such final settlement, if the work of remedying any of the reported defects shall not have been undertaken within six months from the conditional acceptance of the vessel, the estimated cost of making good such defects shall be ascertained and determined by the Compensation Board and deducted in lieu of the actual cost of such items in final settlement, as aforesaid.

Tenth. In case of the failure or omission of the contractor at any stage of the work prior to its completion, not due to strikes

or any other cause or causes beyond its control, to go forward with the work and make satisfactory progress towards its completion, the department may declare this contract forfeited. In case such forfeiture shall be declared, the title to said vessel, or so much thereof as shall have been completed, and to all materials on hand applicable thereto, shall forthwith vest in the department; and the department may immediately enter the works and premises of the contractor and take possession of said vessel and materials. The Secretary of the Navy shall thereupon cause to be taken and filed a full and complete statement and inventory of all work done or begun in, upon, or about said vessel, and of all materials purchased therefore by a board consisting of not less than five persons, quali-
[fol. 21] fied by knowledge and experience for the discharge of their duties, to be appointed by the Secretary of the Navy, which board shall proceed without unnecessary delay to examine such work and materials, and upon such examination the contractor may attend, by representative, and if it so desires, by counsel, and submit such evidence as the board may deem proper.

Eleventh. On receipt of the report and inventory of said board, and on its approval thereof, the department may proceed with the completion of said vessel in accordance with this contract, either at the works of the contractor or elsewhere, by contract or otherwise, in its discretion, using for that purpose all suitable materials on hand, and included in the inventory aforesaid, and may remove said vessel and materials to such other place or places as may be requisite to the exercise of such discretion, and the contractor, on receiving notice of the intention of the department to proceed with the completion of the work, will surrender said vessel and all materials on hand, together with the use, if required, of the yard or plant, and all machinery, tools, and appliances appertaining thereto and theretofore used, or necessarily to be used, in and about the finishing of the work.

Twelfth. Upon final settlement of the liability of the contractor under this contract it shall be paid such amounts for accrued but unpaid parts of item (a) and under items (b), (c), (d), and (e) of paragraph 1 of the sixteenth clause of this contract, together with such allowances for adjustment of special rental provided for under the seventeenth clause, as shall be determined by the compensation board.

Thirteenth. Subject to the conditions enumerated in Section 2 of [fol. 22] the eight hour law of June 19, 1912, no laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight (8) hours in any one calendar day upon such work. Upon each violation of this provision a penalty of five dollars ($5) shall be imposed for each laborer or mechanic for

every calendar day in which he shall be required or permitted to labor more than eight (8) hours upon said work, and the amount of any such penalties shall be withheld for the use and benefit of the United States from any money becoming due under this contract, whether the violation of this provision is by the contract or any subcontractor; provided, however, that if Executive Order No. 2554, of March 22, 1917, wherein the President declares as follows, viz:

"In order to enable the Navy Department to meet the requirements of the law to secure the more expeditious construction of ships and procurement of munitions authorized, and by virtue of the authority vested in me by the provisions of the act of Congress approved March 4, 1917, entitled 'An Act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes' whereby it is provided 'That in case of national emergency the President is authorized to suspend provisions of law prohibiting more than eight hours labor in any one day of persons engaged upon work covered by contracts with the United States: Provided further, that the wages of persons employed upon such contracts shall be computed on a basic day rate of eight hours, with overtime rates to be paid at not less than time and one-half for all hours work in excess of eight hours,' I do hereby authorize the suspension of the provisions [fol. 23] of law prohibiting more than eight hours of labor in any one day of persons engaged in such work under the contract with the Navy Department in all navy yards and private establishments where such suspension of the provisions of the law will result in hastening preparation to meet present emergency conditions."

shall be made applicable to work under this contract and that if overtime work is authorized under the terms of this or other acts, the hours of such overtime shall be subject to the approval and direction of the department.

Fourteenth. This contract shall not, nor shall any interest therein, be transferred by the contractor to any other person or persons, and in the performance of this contract no person shall be employed that is under sentence of imprisonment at hard labor.

Fifteenth. No member or delegate of Congress, officer of the Navy, nor any person holding any office or appointment under the Navy Department, is or shall be admitted to any share or part of this contract, or to any benefit to arise therefrom; but this stipulation, so far as it relates to Members or Delegates to Congress, shall not be construed to extend to this contract, it being made with an incorporated company.

Sixteenth. The department, in consideration of the premises, does hereby contract, promise, and engage to and with the contractor as follows:

1. The price to be paid for the vessel to be constructed and furnished in accordance with this contract, including authorized changes herein, shall be the actual cost, plus 10 per cent for profit. For the purpose of this contract actual cost shall be generally as defined in the revenue bill approved September 8, 1916, Section 302, [fol. 24] insofar as the requirements of the said revenue bill are applicable to and not inconsistent therewith. The accounts and records of the contractor appertaining to this work shall be open at all times to the department, and its representatives, and such statements and returns relative to the expenditures shall be made as are directed by the department. No change shall be required in the present methods and principles of keeping costs, provided the department finds them adequate for the determination of actual costs. All information obtained from the contractor's accounts and records shall be treated as confidential.

The actual cost shall include the following, and items similar thereto in principle:

(a) The cost of labor and materials, machinery, equipment and supplies entering into or expended in the manufacture, building, or construction of the vessel, and other direct charges such as insurance on the vessel, etc.

(b) A proper proportion of interest accrued within the taxable year on bonds or other debts or loans, contracted to meet the needs of the business and the proceeds of which have been actually used to meet such needs.

(c) A proper proportion of running expenses, including ordinary rentals, cost of repairs and maintenance, light, heat, power, insurance, management, salaries, and other indirect charges.

(d) A proper proportion of taxes of all kinds accrued during the taxable year with respect to the business or property.

(e) A proper proportion of physical losses actually sustained within the taxable year in connection with the business, including [fol. 25] losses from fire, flood, storm, riot, vandalism, any acts of God, acts of war, or other casualties, and not compensated for by insurance or otherwise, and a proper proportion of a reasonable allowance for losses and damages resulting from displacement of or delay in work contracted for prior to the date of this contract caused by or contributed to or by work under emergency conditions performed by the contractor for the department.

(f) A reasonable allowance, according to the conditions, for depreciation of values of plant and property. Exceptional depreciation of extensions, increases and additions to plant and property specially acquired for or devoted to the manufacture or erection of the work or the construction of the vessel under this contract will be accounted for in payments under the item special rentals provided for in paragraphs 2 and 3 of the Seventeenth clause of this contract.

2. Higher rates of pay for day's labor shall not be allowed, under this contract than are paid for similar work in progress in the contractor's yard, provided, that nothing herein shall be construed to prevent the contractor from assigning work in divisions or pieces at prices or rates considered reasonable according to its present practice. Payments shall be made by the department monthly within fifteen (15) days after the submission of bills to cover the approved actual cost for the previous month, as defined under items (a) to (f) inclusive, together with a sum equal to ten per cent thereof, and the special rentals for additional plant and equipment provided for in the Seventeenth clause. The reservation of $5,000 called for under the Ninth clause of this contract shall be withheld from the last of said monthly payments as shall be determined by the compensation board. The parts of the vessel paid for under the system of partial payments above specified become thereby the [fol. 26] sole property of the United States.

In the event that for any cause not due to the default of the contractor, the partial payments herein provided for shall cease the contractor shall have the right to discontinue work upon the said vessel, and shall be relieved of its liability for such discontinuance of work under the contract without prejudice to any of its rights hereunder.

3. No payments shall be made except upon bills in quadruplicate certified by the proper inspectors of the vessel, in such manner as shall be directed by the Secretary of the Navy, whose final approval of all bills thus certified shall be necessary before payment thereof.

4. All warrants for payments under this contract shall be made payable to the contractor or its order.

5. When a payment is to be made under this contract, as a condition precedent thereto, the Secretary of the Navy may, in his discretion, require evidence satisfactory to him, to be furnished by the contractor, showing what, if any, liens or rights in rem of any kind against such vessel, or her machinery, fittings, or equipment, or the material on hand for use in the construction thereof, have been or can be acquired for or on account of any work done, or any machinery, fittings, equipment, or material already incorporated as a part of said vessel, or on hand for that purpose; but it is hereby further stipulated, covenanted, and agreed, by the contractor for itself and on its own account and for and on account of all persons, firms, associations and corporations furnishing labor and materials for said vessel and this contract is upon the express condition that no lien or rights in rem of any kind shall lie or [fol. 27] attach upon or against said vessel or her machinery, fittings, or equipment, or the material therefor or any part thereof, or of either, for or on account of any work done upon or about said vessel, machinery, fittings, equipment, or materials, or of any materials furnished therefor or in connection therewith, nor for or on account of any other cause or thing or of any claim or demand of any kind, except the claims of the department.

Seventeenth. For the determination of the actual cost as defined above a "compensation board" composed of not more than six nor less than three officers of the Nevy shall be appointed by the Secretary of the Navy. This board shall ascertain, estimate, and determine the actual cost in accordance with the sixteenth clause hereof, and shall determine the proper proportions and reasonable allowances referred to therein, and the decision of said board or a majority thereof shall be binding on both parties to the contract, subject to the approval of the department. Wherever possible it will lay down in advance the methods to be followed in estimating and determining the actual cost, and where this cannot be done it will act within three months of the date of the receipt thereof on any claim submitted by the contractor. It will determine the methods to be followed by the contractor in preparing bills and by the inspectors in certifying to them, and will determine the items which must be referred for its decision.

It will determine a fair special rental to be allowed the contractor for the use of such additional plant and equipment as must be provided for and used in the carrying out of this contract, such rental to be determined monthly, so nearly as may be to recompense the contractor nor to exceed fifty per cent of the actual cost of such additional plant and equipment, when and as the expenditures there- [fol. 28] fore are made; provided, that at the close of the contract the compensation board will then estimate, ascertain, and determine the value to the contractors of such additional plant and equipment at that time, taking account of all the circumstances, such as additional use made of said additional plant and equipment during the period of the contract, the condition of the shipbuilding business, the desirability of such equipment at that time in carrying on the business, its first cost as compared with the first cost in a normal material and labor market, its replacement value at the time when said determination is being made.

In case the special rental that has been allowed from time to time during the period of the contract does not equal the difference between the first cost of said additional plant and equipment and the value as ascertained at the close of the contract for said additional plant and equipment, the department will pay to the contractor a sum equal to said difference. In case the special rental that has been allowed from time to time during the period of the contract is in excess of the difference between the first cost of said additional plant and equipment and the value as ascertained at the close of the contract, the department will deduct from the final payments and special reserve due the contractor a sum equal to said difference; provided, that no special rental shall be paid for any such additional plant and equipment whose installation shall not have been passed upon and approved by the compensation board.

Eighteenth. When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on the part of the contractor, it shall be entitled, within 10 days after the filing and acceptance of its claim, to receive the said special reserve or so much thereof as it may be entitled to on the execution

[fol. 29] of a final release to the department in such form and containing such provisions as shall be approved by the Secretary of the Navy, or claims against the United States arising under or by virtue of this contract. But it is understood that matters forming elements of price or cost under this contract, when in dispute between the contractor and third persons, shall be excepted from the operation of said release: provided, however, that the contractor may at any time be required by the Secretary of the Navy to settle any such demands upon a decision of the compensation board on the matters in dispute.

Nineteenth. If any doubts or disputes arise as to the meaning of anything in the contract, drawings, plans, or specifications, or if any discrepancy appear between said drawings, plans, or specifications and this contract, the matter shall be referred to at once to the Secretary of the Navy for determination; and his decision in the premises shall be conclusive and binding upon the parties hereto: Provided, that both parties hereto shall have the right of appeal to the President of the United States.

In Witness Whereof, the respective parties hereto have hereunto set their hands and seals the day and year first above written.

Sun Shipbuilding Company. J. Howard Pew, President
Signed and sealed in the presence of Henry C. Carr. The United States, by F. D. Roosevelt, Acting Secretary of the Navy. Graham Egerton, Solicitor, as to F. D. Roosevelt, Acting Secretary of the Navy.

[fol. 30] Several Bond

(This form to be used when the surety is a corporation)

Know all men by these presents. That, we, Sun Shipbuilding Company, the City of Philadelphia, and State of Pennsylvania, principals, and Republic Casualty Company, a corporation organized under the laws of the State of Pennsylvania, and having executive offices in the City of Pittsburgh, and State of Pennsylvania, and Chicago Bonding and Insurance Company, a corporation organized under the laws of the State of Illinois, and have executive offices in the City of Chicago and State of Illinois, and London and Lancashire Indemnity Company of America, a corporation organized under the laws of the State of New York, and having executive offices in the City of New York, and State of New York, sureties, are held and firmly bound unto the United States of America, the principals, in the full and just penal sum of One hundred and forty thousand ($140,000.00) dollars, lawful money of the United States, jointly and severally with each surety as herein specified, and the said Republic Casualty Company, jointly and severally with said principal in the sum of Fifty-five thousand ($55,000.00) dollars of said penal sum and no more; and the said Chicago Bonding and Insurance Company jointly and severally with said principal in the sum of Fifty-five thousand ($55,000.00) dollars of said penal sum

and no more; and the said London and Lancashire Indemnity Company of America jointly and severally with said principals in the sum of Thirty thousand $(30,000.00) dollars of said penal sum and no more; for the payment of which respective sums, well and truly to be made to the United States, we bind ourselves, our heirs, execu-[fol. 31] tors, administrators, successors and assigns, in the manner and in the respective sums hereinbefore set forth, firmly by these presents.

The obligors herein expressly agree that, for the purpose of allowing a joint action against any or all of them, and for that purpose only, this bond shall be treated as the joint and several as well as the several obligation of these of the obligors.

The condition of this obligation is such, that if the above bounden principals Sun Shipbuilding Company shall well and truly perform and fulfill its contract, dated June 13, 1917, entered into with the United States, for construction of seagoing mine sweepers numbered 22, 23 and 24, confirming in all respects to the stipulations, covenants, and conditions of said contract, as it now exists or may be modified according to its terms, and shall promptly make payments to all persons supplying Sun Shipbuilding Company with labor and materials in the prosecution of the work provided for in aforesaid contract, then this obligation to be void and of no effect; otherwise to be and remain in full force and virtue.

[fol. 32] In Testimony Whereof, the said principals and sureties have signed, sealed and delivered this bond this tenth day of October, A. D., 1917.

Sun Shipbuilding Company, by J. Howard Pew, President. Segumacher, Secy. Republic Casualty Company, by Geo. F. Parker, Attorney in Fact. E. T. Fisger, Ivy Eberly, Chicago Bonding & Insurance Co. —— ——, Attorney in Fact. L. C. Wilson, L. B. Featherston. London and Lancashire Indemnity Company of America. Oscar J. Rickett, Attorney in Fact. W. W. Parker.

[fol. 33] II. General Traverse—Filed Dec. 21, 1922

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. Argument and Submission

On May 26, 1924, this case was argued and submitted on merits by Mr. Frank E. Scott, for the plaintiff, and by Mr. Dwight E. Rorer, for the defendant.

[fol. 34] IV. **Findings of Fact, Conclusion of Law, and Opinion of the Court by Downey, J.**—Entered June 9, 1924

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT

I

The plaintiff, the Sun Shipbuilding Company, was at all the times herein mentioned and is, a corporation organized and existing under the laws of the State of Pennsylvania. Beginning with the year 1916, the plaintiff constructed, owned, and operated a shipbuilding yard at Chester, Pennsylvania, comprising five similar shipbuilding ways, each adequate for the construction thereon of vessels of upwards of 12,000 D. W. tons, together with an auxiliary fabricating and engine building plant sufficient to supply the requirements of the said five shipbuilding ways, the whole being of the capacity for the efficient employment of upwards of nine thousand men.

On June 13, 1917, the plaintiff had contracts on hand for the construction of 18 vessels of 10,000 D. W. tons capacity each, according to the contracts, but of actual tonnage ranging from 10,375 to 12,130.

II

On May 16, 1917, four of plaintiff's ways were occupied by vessels under construction, but way No. 5 was unoccupied, being held for the purpose of laying thereon the keel of contract vessel No. 7, the materials for which were on hand and then being fabricated preparatory to the laying of the keel.

III

About May 16, 1917, and thereafter the Secretary of the Navy had under consideration the construction of 24 vessels known as mine sweepers, and addressed a letter to the plaintiff requesting information as to the suitability of plaintiff's plant for that purpose, but plaintiff did not desire to undertake any of this work because of the [fol. 35] schedule of ship construction which it already had on hand, and represented that the mine sweepers could be constructed in ship yards less suitable for the construction of large vessels. Following conferences upon the subject the Secretary of the Navy announced the conclusion that the early construction of these vessels was of such importance that it was deemed best to place orders for their construction with large, well-equipped yards and on or about June 12, 1917, placed with the plaintiff the following order:

"Navy Department,
"Washington, D. C., June 12, 1917.

"GENTLEMEN: Referring to your telegram of June 11, 1917, in reference to the construction of seagoing mine sweepers, the Presi-

dent hereby places with you, as an order under the provisions of the naval appropriation act of March 4, 1917, the requirement that you comply with the terms of a contract, to be signed hereafter, to construct seagoing mine sweepers Nos. 22, 23, and 24.

"You will be paid for these vessels on the basis of actual cost plus ten per cent profit.

"All detailed working plans and schedules for material of all kinds will be supplied by the Government through the Harlan & Hollingsworth Corporation, Wilmington, Delaware. The Government will likewise supply through that corporation all patterns for both hull and machinery castings; furthermore, that corporation will place orders for all material of all kinds entering into the construction of all of the 24 of these vessels which are to be constructed by various shipbuilders at this time. Such material for mine sweepers Nos. 22, 23, and 24 will be billed to you direct by the subcontractor for the material, and will be paid for by you, such payments being included in the actual cost of the vessels. You will be under no financial obligation to the Harlan & Hollingsworth Corporation. All of the charges for the services performed by them will be paid by the Government. The only material which will be supplied direct by the Government will be that listed in the specifications, and the hull auxiliaries, namely, steering gear, windlass, capstan, special towing machine, and winches, for which the Government will pay direct, and their cost will not enter into your actual cost of construction, as referred to above.

"You will be responsible for workmanship and for the most expeditious prosecution possible of the work after receipt of necessary materials, and for the time of delivery, except as affected by delivery of material, and subject to the usual contract clause permitting extension of time in case of delays due to strikes or causes beyond your control. The responsibility for suitability of and delivery of materials, and for performance of the vessels, insofar as affect by design and materials, will rest with the Government.

"Orders have been placed for the construction of other vessels of this same class with the following firms:

"Todd Shipyards Corporation, New York, N. Y.

"Standard Shipbuilding Corporation, New York, N. Y.

"Pennsylvania Shipbuilding Company, Gloucester, N. J.

"Chester Shipbuilding Company, Chester, Pa.

"The Pusey & Jones Shipbuilding Company, Wilmington, Del.

"Baltimore Dry Dock & Shipbuilding Company, Baltimore, Md.

[fol. 36] "Staten Island Shipbuilding Company, Port Richmond, N. Y.

"It is suggested that the work in connection with the construction of these vessels might be expedited and simplified if you arrange to perform certain portions of it, such as laying down in the mold loft and preparation of molds, in conjunction with such of the firms listed above as may be located in your vicinity.

"The construction of these vessels in the quickest possible time is considered by the military authorities to be of the highest importance, and work on them, and the materials for them, has been as-

signed a place in order of relative importance with other war work equal to and parallel with torpedo-boat destroyers, which gives them precedence over all other classes of naval construction, with the exception of repairs and conversion work on completed ships and work on submarine chasers. The department trusts that you will do all in your power to expedite the completion of these vessels at the earliest possible date.

"Very respectfully, Josephus Daniels, Secretary of the Navy.

"The Sun Shipbuilding Company, Finance Building, Philadelphia, Pa."

IV

At some time during the course of the negotiations between the Navy Department and the representatives of the plaintiff, from May 16, 1917, to June 12, 1917, with reference to the construction of these mine sweepers, representatives of the Secretary of the Navy directed the plaintiff to hold its way No. 5 open for the construction of three mine sweepers. Plaintiff represented that if it might be permitted to go ahead with its program as to the use of way No. 5, it could free another way in time for the mine sweepers but the representatives of the Secretary were unwilling to take any chance in this respect and insisted on No. 5 being held for the Government's vessels.

V

Subsequently the Secretary of the Navy forwarded to the plaintiff for execution a contract bearing date June 13, 1917, a copy of which is attached to plaintiff's petition herein marked Exhibit A, and is made a part hereof by reference. Said contract was not executed until some time subsequent to the date thereof but the date of its execution does not appear.

On June 19, 1917, plaintiff represented that the Alabama Dry Dock & Shipbuilding Company was willing and anxious to build four mine sweepers and asked authority to assign this contract to that company but the Secretary of the Navy, in a letter of June 22, refused to consent thereto and the plaintiff, on June 29, 1917, acknowledging receipt of the Secretary's letter, stated that it was accordingly entering order for these vessels and, as to the contract, said:

"We have gone over your form of contract for the sweepers and believe it to be fair and reasonable in every particular, save that pertaining to the demurrage on other ships, for which we have contracts. We shall, of course, expect your department to protect us [fol. 37] against our paying any and all demurrage accruing on these contracts due to the building of these mine sweepers.

"We await a formal contract from you for our execution."

It does not appear that any other contract was submitted or executed than that of date June 13, 1917, a copy of which appears as an exhibit to the petition.

VI

None of the materials to be used in the construction of the three mine sweepers was to be ordered or furnished by the plaintiff, but all such materials, including all patterns for hull and machinery castings, by the terms of the order or contract, were to be and were, in fact, ordered and supplied by the Harlan & Hollingsworth Corporation, subject to the approval of the Navy Department for delivery direct to the plaintiff. Following the said orders and directions of the Secretary of the Navy and his duly authorized agents, plaintiff's said way No. 5 was kept open and available for the construction of the three mine sweepers, but defendant and its agent, the Harlan & Hollingsworth Corporation, did not supply material sufficient to permit the laying of the keels of the first two mine sweepers until on or about October 8, 1917, and said way remained idle and unemployed between the dates June 18, 1917, and October 8, 1917, a total of 112 days. This delay in the delivery of materials was repeatedly called to the attention of the Navy Department by the plaintiff. After the material was supplied for the laying of the keels of the two mine sweepers on or about October 8, 1917, there were subsequent delays in the delivery of the necessary material for completion, and way No. 5 was occupied in said work until on or about May 30, 1918, when the last of the three vessels was launched.

A reasonable time for the occupation of said way No. 5 for the construction of the said three mine sweepers in the event the material for their construction had been promptly delivered to the plaintiff, would have been approximately 118 days. This finding is approximate only because based on estimates and a reported accomplishment in another yard. There is no basis for accurate determination of the time plaintiff would have required for the construction of these three vessels.

VII

Subsequent to the issuance of the final orders of the Navy Department, as provided in its letter of June 12, 1917, and its contract dated June 13, 1917, the plaintiff duly performed all the terms of said contract and duly completed in a good and workmanlike manner all of the work therein to be performed and delivered the three mine sweepers constructed to the satisfaction of the Navy Dpartment.

VIII

In consideration of plaintiff's due performance of said contract it was paid the sum of $1,664,390.09, but said payment did not include any compensation for certain items of claim which were made to the Navy Department as follows:

[fol. 38] (1) Compensation for the use and occupation of plaintiff's way No. 5, for the period of 228 days, being the difference between the total period of 346 days from June 18, 1917, to May 30, 1918, and the period of 118 days, during which latter period it is alleged

the mine sweepers should have been constructed, said period of 228 days comprising a period of 112 days between June 18, 1917, and October 8, 1917, during which time the way was idle awaiting material for the construction of the mine sweepers, and the period of 116 days which it is alleged was due to time lost between October 8, 1917, and May 30, 1918, on account of the delays in the delivery of material for the work.

(2) Compensation in the sum of $152,000 for amortization of war facilities or special rental which it is alleged is provided for in paragraph 1 (f) of the sixteenth clause and paragraphs 2 and 3 of the seventeenth clause of the contract of June 13, 1917.

(3) Reimbursement of the sum of $4,000.76 for the alleged proper portion of plaintiff's cost and expense for superintendents' and officers' salaries and the additional compensation of 10 per cent thereof, aggregating $4,400.84, alleged to be provided for in paragraph 16 of the contract of June 13, 1917.

(4) Compensation in the sum of $1,335.70, representing 10 per cent of the actual cost in the payment by plaintiff of retroactive wages pursuant to the decision of the shipbuilding labor adjustment board.

(5) Balance of $1,500 considered to be due the plaintiff under the contract, approved for payment by the Navy Department but payment withheld awaiting execution by the plaintiff of a final release.

IX

All of the items above enumerated from (1) to (4), inclusive, were incorporated in claims by plaintiff which were presented to and considered by the compensation board created as provided in the contract of June 13, 1917, and were by said board rejected.

During the period of the pendency before the compensation board of plaintiff's claim for 228 days time at $474.82 per day, $108,258.96, stated as "loss of earnings to Sun Shipbuilding Company account of tying up No. 5 shipway, waiting for material for laying of keel and construction of the boats on the ways," plaintiff waived "all claim arising from delay after material was received and construction started" and made claim "only for compensation for the period during which the way was held open before the receipt of the keel plates."

X

There is no averment or evidence that the compensation board in considering and acting on plaintiff's claim acted in bad faith or otherwise than in the exercise of an honest judgment.

Conclusion of Law

Upon the facts found the court concludes as matter of law that the plaintiff is entitled to recover $1,500 referred to in paragraph (5) of Finding VIII, but that otherwise it is not entitled to recover.

[fol. 39] It is therefore adjudged that plaintiff recover of and from the United States the sum of fifteen hundred dollars ($1,500).

Opinion

Downey, Judge, delivered the opinion of the court.

The plaintiff's claim is for disallowed items growing out of the placing with it by the Secretary of the Navy of an order for the construction of three vessels known as mine sweepers and a contract entered into between the parties with reference thereto.

Plaintiff had established a shipbuilding plant in 1916, and at the time that the matters herein involved were the subject of discussion, in the latter part of May and early part of June, 1917, it had at its plant five shipbuilding ways, four of which were occupied by commercial vessels under construction, and it had a number of contracts for the construction of commercial vessels, and anticipated the use of way No. 5, then vacant, for the construction of one of these, beginning about June 18.

The Secretary of the Navy, acting under authority of the President and under the provisions of the act of March 4, 1917, sub-head "Naval Emergency Fund," 39 Stat. 1192, desired to procure the speedy construction of twenty-four mine sweepers for war purposes, and conferred, either personally or by naval officers authorized to represent him, with representatives of the plaintiff with reference to the construction of three of these vessels. Plaintiff did not desire to undertake this work and insisted that it ought to be placed with small yards not equipped for the construction of large vessels, but the Secretary, because of the importance of this building program, insisted that it should be undertaken by established yards competently equipped for the work and the plaintiff was told that it must hold its then vacant way No. 5 for the construction of these naval vessels. It asked permission to go ahead with its program for the contemplated use of this way which it was anticipated would begin about June 18, and use another way for these vessels when it should be vacated, but this plan was disapproved and its way No. 5 was held as directed.

A formal order with reference to the construction of these vessels was issued to plaintiff on June 12, 1917, and this was followed by the contract, copy of which appears as an exhibit to the petition, which bears date June 13, 1917, but which it appears was executed subsequent to that date, but at a time not shown. This was a cost plus contract.

There were unanticipated delays in the furnishing of materials for these vessels by the agency of the Government to which that duty had been delegated. The first keel plates were received about September 15, but the keels of the first two of these vessels were not laid until about October 8, and until that time way No. 5 remained idle. It is because of this idle time and time subsequently alleged to have been lost by reason of delay in furnishing materials that plaintiff asserts the first item of its claim. The claim as presented was for loss of earnings "account of tying up No. 5 shipway waiting for material for laying of keel and construction of the boats on the ways," 228 days at $474.82 per day, amounting to $108,259.96, the 228 days being arrived at by taking 346 days as the total elapsed time from [fol. 10] June 18, 1917, when it is said it was planned to lay the keel

of a merchant vessel on way No. 5, to May 30, 1918, when the last of the three vessels was launched, and deducting therefrom 118 days as the time during which it is asserted this way would have been occupied in the construction of these vessels had there been no delay in furnishing materials, and, 112 days of the 228 being assigned to the period from June 18 to October 8, when the way was idle awaiting keel plates, the remaining 116 days are ascribed to delays in funishing materials after the work had commenced.

There was no time fixed for the completion of the vessels and during the time plaintiff's claims here presented were pending before the compensation board provided for in the contract plaintiff, in a communication to the board, abandoned its claims on account of delays occurring after the work commenced and asserted it only as to the 112 days during which this way was idle before the keels were laid for the first two vessels on October 8. However this claim as originally asserted is now asserted here notwithstanding this abandonment.

The theory upon which this claim as to the 112 days is here asserted in brief and argument is that the direction given to the plaintiff to hold its way No. 5 for the construction of these three naval vessels constituted a commandeering or a "taking" of that way for this preliminary period of 112 days such as entitles the plaintiff, outside of the provisions of the contract, to "just compensation" therefor. It is difficult to construe the petition as asserting this theory and in correspondence during the pendency of the claim with the compensation board the plaintiff did not contend that there was a commandeering of this way but that it was held open for this work pursuant to instructions and that it was "morally entitled to compensation" just as it "would have been legally entitled had the way been formally commandeered."

We do not take, within proper limitations, any issue with this quoted contention and, as the situation appears to us, would be inclined to award some moderate compensation, much less, however, than plaintiff claims, for this period, if it were within our province to do so, but we are of the opinion that, under the circumstances, we have no power to consider the question on its merits.

From this statement it is not to be assumed that we agree with plaintiff's contention now made that there was a commandeering of this way for this period, resulting in effect in a separation of this period from the subsequent period during which the way was in actual use in the construction of the vessels and entitling the plaintiff to "just compensation" as for a taking. Such a contention can not be regarded as well founded.

If, proceeding under the "Naval Emergency Fund" provision of the act of March 4, 1917, the Secretary of the Navy had placed an order with the plaintiff for the construction of these vessels, with which the plaintiff, without other procedure, had complied, the provisions of the act as to just compensation would have been applicable as the proper basis of settlement and, if the compensation fixed had been unsatisfactory, further claim might have been made in this court. But, with reference to the construction of the vessels,

the parties entered into a contract fixing the basis of compensation and granting broad powers with reference thereto to a "compensation [fol. 41] board" to be created for the purpose. We need not quote here the applicable provisions of that contract which may readily be found by reference.

There is some apparent indisposition to recognize this document as a contract. It is sometimes referred to as "order" and it is suggested that its signing by the plaintiff was rather a formality than a necessity, but, it is clearly a contract. Plaintiff in writing the Secretary that it was "fair and reasonable" save in one respect not here material, referred to it as a contract, in submitting its claim for the items here involved to the compensation board it referred to it as a contract, and by that action in so submitting its claims it recognized the jurisdiction of the compensation board. The apparent fact that plaintiff might have discharged its obligations under the law by complying with an order for the construction of the vessels without executing a contract, which was not required by the law, can not affect its obligations under a contract which it saw fit to execute. It may have deemed it for its own advantage to accept a proferred contract prescribing a basis of compensation, but its motive is immaterial.

Additional compensation for the use of this way during the period in question was considered by the compensation board upon the presentment of a claim therefor by the plaintiff and it was within the power of that board, under the contract, to have made an additional allowance therefor. Such an additional allowance might properly have been included by the board in the costs which it was authorized to ascertain if it had deemed the plaintiff entitled thereto.

We need not consider the basis of the board's conclusion in the matter further than to suggest that, whether right or wrong, the claim was given careful consideration and there is no averment or evidence of bad faith or failure to exercise an honest judgment. Under the circumstances we can not review the finding of the board. Sufficient applicable authorities, although there are others, are cited by Judge Hay in his opinion in Brinck, Receiver, 53 C. Cls. 170.

It is averred in the petition, after reciting the disallowance by the board, that "the plaintiff accordingly brings this suit in the Court of Claims, not being satisfied with the decision of said compensation board in denying plaintiff's claim." We find nothing in the provisions of the contract authorizing resort to this court in case of dissatisfaction with the action of the board. The contract itself, as well as the law, precludes such a contention.

What has been said is necessarily determinative of all other items of plaintiff's claim, except the item of $1,500 retained because of plaintiff's refusal to execute a final release. The item discussed is apparently the only one which furnishes any room for argument upon the question of the jurisdiction of the compensation board and our conclusion in that respect embraces them all.

The execution of a final release to entitle the plaintiff to receive the $1,500 retained but admittedly due is rendered unnecessary by

this adjudication of the rights of the parties and judgment has therefore been awarded for that amount.

Hay, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

[fol. 42] V. JUDGMENT

At a Court of Claims held in the City of Washington on the Ninth day of June, A. D., 1924, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the plaintiff, and do order and adjudge that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of One Thousand and Five Hundred Dollars ($1,500.00).

By the Court.

VI. PROCEEDINGS AFTER JUDGMENT

On June 24, 1924, the plaintiff filed a motion for a new trial.

On October 20, 1924, the court entered the following order on said motion:

Order

On plaintiff's motion to amend findings and for new trial it is ordered that the words "for each vessel" at the end of the fourth line in the second paragraph of Finding VI be stricken out, and that otherwise plaintiff's motion be overruled.

(NOTE.—Said correction appears on page 37 of this record.)

On October 27, 1924, the plaintiff filed a motion for leave to file an amended motion to amend findings.

On said motion, for leave to file, the Court on November 3, 1924, made the following order:

"Considered by the Court, and overruled."

[fol. 43] VII. PETITION FOR APPEAL—Filed Dec. 1, 1924

Now comes the plaintiff herein, by its attorneys, and applies to the Court for an appeal from the judgment of this Court filed herein on June 9, 1924, from which a motion for a new trial was overruled on October 20, 1924.

Respectfully submitted, Dean & Scott, Attys. for Plaintiff.

VIII. Order Allowing Appeal

It is ordered by the court this 8th day of December, 1924, that the plaintiff's application for appeal be and the same is allowed.

[fol. 44] In Court of Claims

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the Court by Downey, J; of the judgment of the court; of the proceedings after the entry of judgment; of the plaintiff's application for an appeal, and of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 8th day of December, A. D., 1924

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Court of Claims.

Endorsed on cover: File No. 30,781. Court of Claims. Term No. 237. Sun Shipbuilding Company appellant, vs. The United States. Filed December 30th, 1924. File No. 30,781.